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IN THE

Supreme Court of the United States

October Term, 1957

No. 759

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

WILLIAM (BILL) ATTERBURY, JANE BARRY, ALFRED E. BEATY, CHARLTON (PAT) CARPENTER, BERNICE A. CARPENTER, HARRIET CARTWRIGHT, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

JOHN H. ATTERBURY, JR., DOROTHY F. ATTERBURY, BARRY BATE, HOYT VANCE BEATY, RICHARD H. BOTTICHER, LAWRENCE E. BOWMAN, GEORGE CARPENTER, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

On Appeal From the Supreme Court of California

SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE (PETE) CARPENTER, RUSSELL A. CHEEVER, HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, *Appellant*,

v.

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER, GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated, *Appellees*.

On Appeal From the Supreme Court of California

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of California sustaining as constitutional under the Fourteenth Amendment to the Federal Constitution a statute of the State of California.

OPINION BELOW

The opinion of the Supreme Court of California is reported at 49 Advance California Reports 339, 41 BNA, LRRM 2151, and that of the California District Court of Appeal is reported at 150 ACA 484.863, 310 P 2d 145. The opinion of the Superior Court in and for the County of Los Angeles is not reported. Copies of the three opinions are attached hereto as Exhibit A.

JURISDICTION

Appellees in each case petitioned the California District Court of Appeal for a writ of mandate (pursuant to California Code of Civil Procedure Sections 1084-1097, Deering's California Codes, Civil Procedure, pp. 506-512), directing the Superior Court in and for Los Angeles County to exercise jurisdiction in respective actions in which each group of appellees were plaintiffs. The petitions were heard together, and, in a single opinion and judgment entered on April 24, 1957, said court granted the writs of mandate. By order entered on May 21, 1957, said Court denied a petition for rehearing but modified its opinion. Upon petitions for hearing filed by appellant herein and others, the Supreme Court of California, by order entered on June 19, 1957, vacated the judgment of the District Court of Appeal and granted rehearing. Upon hearing in the Supreme Court of California, that Court entered judgment on November 5, 1957, granting the writs of mandate, and the notice of appeal was filed in that Court on December 3, 1957.

This Court has jurisdiction to review by appeal the judgment of the Supreme Court of California under 28 U.S.C. § 1257(2).

It has been held by this Court that it has jurisdiction to review by appeal the final judgment in a mandamus proceeding in *Detroit & M. R. Co.* v. *Michigan R. Com.*, 240 U.S. 504, 570-571, and this Court exercised jurisdiction by appeal to review a judgment of the Supreme Court of California in a mandamus proceeding in *Pacific Coast Dairy* v. *Dept. of Agriculture*, 318 U.S. 285.

QUESTIONS PRESENTED

A. Where plaintiffs in an action in California claim that debts, owing to a New York trustee under the terms of contracts made in New York, are owing to plaintiffs instead of to said trustee because said contracts are invalid, and said trustee has never resided in California, and has not been served with process in California and has not appeared in said action,

(1) do Sections 412-413 of the California Code of Civil Procedure violate the Fourteenth Amendment to the Federal Constitution insofar as they purport to confer jurisdiction on a California court, to adjudicate said claim?; and

(2) is it a violation of said Amendment for a California court to exercise jurisdiction to determine said claim?

B. Where plaintiffs in an action in California claim that debtors, under contracts made in New York which obligate said debtors to make continuing payments to a New York trustee, should cease making payments to said trustee and should instead make such payments to the plaintiffs on the ground that said contracts are invalid, and said trustee has never been a resident of

California, has not been served with process in California and has not appeared in said action,

(1) do Sections 412-413 of the California Code of Civil Procedure violate the Fourteenth Amendment to the Federal Constitution insofar as they purport to confer jurisdiction on a California court to adjudicate said claim?; and

(2) is it a violation of said Amendment for a California court to exercise jurisdiction to determine said claim?

STATUTE INVOLVED

Sections 412 and 413 of the California Code of Civil Procedure, Deering's California Codes, Civil Procedure, pp. 184-185, provide as follows:

Sec. 412. "Where the person on whom service is to be made resides out of the State; or has departed from the State; or can not, after due diligence, be found within the State; or conceals himself to avoid the service of summons; or is a corporation having no officer or other person upon whom summons may be served, who, after due diligence, can be found within the State, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit or by the complaint on file, that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant or corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in

part in excluding such person or corporation from any interest therein, such court, or judge, may make an order that the service be made by the publication of the summons."

Sec. 413. "The order must direct the publication to be made in a newspaper, to be named and designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once each calendar week, but publication against a defendant residing out of the State, or absent therefrom, must be pursuant to Section 6065 of the Government Code, except in proceedings instituted pursuant to the provisions of Chapter 4, Title 3, Part 3 of this code. In case of publication, where the residence of a nonresident or absent defendant is known, the court, judge, or justice, must direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office. Service is complete upon th making of such personal service or at the expiration of the time prescribed by the order for publication, whichever event shall first occur.

"As used in this section 'post office' includes mail box, sub-post office, substation and mail chute or other like facility regularly maintained by the Government of the United States."

STATEMENT OF THE CASE

Appellees Anderson, et al, instituted an action in the California Superior Court against the American Federation of Musicians of the United States and Canada (herein called the "Federation"), phonograph record manufacturers, and Samuel R. Rosenbaum, the

trustee of a New York charitable trust created to educate the public to appreciate music and thereby to increase the employment of musicians by private employers. That trust was created in New York by agreement between said manufacturers and the trustee (to which the Federation was not a party) and, under the trust agreements, the manufacturers agreed to make continuing contributions of funds to the trust. Plaintiffs, who are a group of musicians (suing on behalf of all musicians in the United States similarly situated), differing with the Federation, the exclusive bargaining agent of musicians, as to the economic problems facing musicians, alleged that the Federation had no power to enter into collective agreements with the employers whereunder the employers agreed to create said trust and to contribute to it because, as they view the economic problems, the Federation's solution favors a majority of musicians against a minority to which plaintiffs claim to belong. They requested that the manufacturers be enjoined from making further payments to the trustee and that they be required to make said payments to the plaintiffs instead. All the agreements were made in New York and are to be construed under New York law. The Federation and most of the manufacturers have their principal offices in New York, the trustee has his sole office in New York the payments are required to be made in New York and two-thirds of the recording of phonograph records in the United States takes place in New York. The plaintiff musicians are not suing on any transaction which they have had with the trustee, but only with respect to a transaction which the companies in New York have had with the trustee in New York and on another transaction which such companies had with the Federation in New York.

Appellees Atkinson, et al, are also musicians suing as representatives of the class. They instituted suit in the same California court against the Federation, distributors to television exhibitors of old theatrical films, and said trustee (and also a large number of other companies, joined through error, which had no connection with this lawsuit). Almost all of the motion picture films here involved were made prior to 1946. After the films were made, the Federation and producers of films agreed that the films previously produced would not be exhibited on television without further agreement with the Federation. Subsequently, the Federation entered into agreements in New York, largely with distributors (almost all of whom had their principal offices in New York), who purchased these old films from the producers, under which the films were released to television. These distributors entered into agreements in New York with said trustee (to which the Federation was not a party) in which they agreed to make continuing contributions in New York to the aforementioned trust and for the same purpose. They also agreed in New York with the Federation to make new sound tracks for the television exhibitions. When the latter agreements expired, they agreed, as a substitute for making new sound tracks, to make payments to musicians who made the theatrical sound tracks (without further services by them). In June, 1955, the few agreements with the Federation then in effect were amended prospectively to provide that, with respect to motion pictures thereafter released to television, these payments to musicians would be discontinued and all payments would be made to said trustee. Agreements entered into with the Federation after June 1955 provided that all payments should be made to said trustee.

In this action, too, and for the same reasons, the plaintiffs alleged that the Federation had no power to enter into said agreements with the distributors under which the latter agreed to contribute to said trust. They requested that the distributors be enjoined from making any payments to said trustee and that they be required to make said payments to the plaintiffs. Here, too, the plaintiff musicians are not suing with respect to any transaction which they have had with the trustee. Instead, they are suing with respect to transactions between companies in New York (most of whom never employed any musicians) and the trustee in New York and between those companies and the Federation in New York.

In neither action was the trustee (who never resided within California) served with process within the State of California nor has he appeared in either action. In both actions plaintiffs moved for a temporary injunction restraining the manufacturers and distributors, respectively, from making payments to the trustee and for the appointment of a receiver. After a joint hearing on the motions in both actions, the Superior Court held (in a single opinion) on January 24, 1957, that it lacked jurisdiction to entertain said motions because of the absence of personal service on the trustee within the State of California.

Plaintiffs in each action thereupon separately petitioned the California District Court of Appeal, Second Appellate District, Division Two, for a writ of mandate directing the Superior Court in and for Los Angeles County to exercise jurisdiction over the motion in the respective actions for a temporary injunction restraining the manufacturers of phonograph records and distributors of television film, respectively,

from making payments to the trustee, and for the appointment of a receiver to collect the payments, which would, under the agreements have been payable to the trustee.

The Federation filed a brief in opposition to each petition for writ of mandate. In each brief the sole ground urged was that, under the Fourteenth Amendment to the Federal Constitution, it would be unconstitutional for the courts of the State of California to exercise jurisdiction in the action in the Superior Court, which involved conflicting claims to an intangible obligation for the payment of money undertaken by a third person.

Each brief stated the issues as follows:

> "Two issues are presented upon this Petition for a Writ of Mandate. They are (1) whether the Trustee is an indispensable party and (2) if he is, how must service upon him be effected in order to permit the Court to take action which affects his rights.
>
> "These issues are determinable under the 14th Amendment to the Federal Constitution and hence are governed by the decisions of the Supreme Court of the United States." (p. 2)

The District Court of Appeal held that due process under the Fourteenth Amendment permitted *in rem* jurisdiction to be exercised and that Section 412, California Code of Civil Procedure authorized the Superior Court to exercise *in rem* jurisdiction. It therefore directed, on April 24, 1957 (by a single judgment covering both proceedings) the issuance of the writ of mandate in each proceeding. On May 21, 1957 it issued an order correcting certain misstatements of facts in its opinion, and denying rehearing.

The real parties in interest, including the Federation, thereupon petitioned the Supreme Court of California (which petitions covered both proceedings) for a hearing.

Again, the sole ground urged by the Federation was that the California court could not, without violating the Fourteenth Amendment to the Federal Constitution, exercise jurisdiction in either of the two actions, which involved rival claims to an intangible, without personal service upon the trustee within California, since he was a claimant to the obligations arising under the contracts. The Federation's petition stated (p. 3):

> "Whether or not the process issued by a state court is adequate to confer jurisdiction over the party sought to be served constitutes a Federal Constitutional issue. As the Supreme Court of the United States held in *Pennoyer* v. *Neff*, 95 U.S. 713, 733:
>
> > 'Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom the court has no jurisdiction do not constitute due process of law.' "

The petition for hearing filed by Columbia Broadcasting System, Inc. and five other real parties in interest raised the question (pp. 2-3) whether:

> "a California court (in view of the Fourteenth Amendment to the United States Constitution), has power, upon the basis of substituted service of process upon the non-resident trustee, to de-

clare invalid and void the non-resident trustee's rights and obligations under such agreement . . ."

The petition for hearing filed by Loew's, Inc. and four other real parties in interest likewise raised the question (pp. 2-3) whether "under the due process clause of the United States Constitution" a court could exercise *in rem* jurisdiction over a debt to which there are adverse claimants "solely because the court has personal jurisdiction over the third party debtor?"

The Supreme Court of California held that under Sections 412-413 of the California Code of Civil Procedure, service upon the trustee in New York was adequate to give the Superior Court quasi in rem jurisdiction and that due process requirements under the Federal Constitution did not bar the exercise of that jurisdiction.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A vital question relating to the jurisdiction which a state may claim for its own courts under the due process limitation of the Fourteenth Amendment to the Federal Constitution is here presented. And the question involves a common factual situation: A person becomes obligated to another pursuant to the terms of a contract between them made in one state. A third party, claiming that the intangible debt under the contract belongs to him and should be paid to him rather than to the obligee under the contract, sues the debtor and the obligee in a second state. May a court of that second state exercise jurisdiction without personal service within the state upon the nonresident obligee, who has not appeared in the action? The Supreme Court of California has held that Sections 412 and 413 of the California Code of Civil Procedure

authorize the exercise of jurisdiction by the state court in such a situation and that the Fourteenth Amendment to the Federal Constitution is not thereby violated.

That determination is in conflict with the decision of this Court in *New York Life Ins. Co.* v. *Dunlevy*, 241 U.S. 518. In that case the Insurer issued its policy in Pennsylvania and the two rival claimants to its proceeds, Dunlevy and Gould, both resided there. The Insurer paid the policy proceeds into the registry of a Pennsylvania state court and interpleaded the two rival claimants. After the dispute arose but before the interpleader was commenced, Dunlevy moved to California and was served by publication. This Court remarked that if Dunlevy's ownership of the policy proceeds were conceded, they could be seized and applied to satisfy her obligations. However, it held that her rival claim against Gould to the proceeds could not be litigated without personal service over her. In rendering its holding that the Pennsylvania court lacked jurisdiction, this Court stated:

> "This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts" (241 U.S. at 521)

California held *Dunlevy* not to be controlling here because, in that case, the debtor

> "sought to compel conflicting claimants to adjudicate their rights in a forum of his choice." (49 AC at 348),

whereas, here, it was one of the rival claimants which picked out the forum in which to litigate. Thus, California holds that while the Fourteenth Amendment

precludes a debtor, who has no interest other than to pay the proper party, from invoking the jurisdiction of a state court unless personal jurisdiction over both rival claimants is secured, but that it does not preclude either one of the rival claimants even though there is no personal jurisdiction over the other claimant.

This Court, as an alternative ground of decision, held that the rival claimant could not institute such an action without personal service on the other claimant in *Bank of Jasper* v. *First Nat. Bk.*, 258 U.S. 112, aff'g. 264 Fed. 83. There, Florida residents paid monies to a Georgia corporation, which monies were deposited in the Florida bank. That bank issued its certificate of deposit which was negotiated to a Georgia bank. The Florida residents brought an action in a Florida state court against the Florida bank and the Georgia bank, serving the latter by publication, in which they claimed that the deposits belonged to plaintiffs and not to the Georgia bank. Plaintiffs prevailed but this Court held that the Fourteenth Amendment precluded the Florida court from exercising jurisdiction. Again, this Court pointed out that if plaintiffs had claimed that the deposits belonged to the Georgia bank, they could be seized to satisfy obligations of the bank. It went on to hold, however:

> "But the suits in the state court were not of that character. In them the complainant [the Florida residents] asserted that, by reason of the fraud alleged, the Jasper Bank [the debtor] was not indebted to any of its co-respondents [the Georgia bank], but to the claimant [the Florida residents]." 258 U.S. at 119.

Thus, this Court held here that a rival claimant could not institute an action to determine ownership of the intangible without personal service on the nonresident, rival claimant. This Court then proceeded to add the additional ground that the certificates of deposit issued by the Florida bank converted the deposit into a negotiable instrument which was not within the jurisdiction of the state court. California held that the second ground constitutes the holding of the *Bank of Jasper* case and that the first is not binding upon it.

This Court made no distinction in stating the rule applicable to the rival claim situation, between suits instituted by the debtor and those instituted by one of the rival claimants, in *Estin* v. *Estin*, 334 U.S. 541, at 548 and in *Vanderbilt* v. *Vanderbilt*, 1 L. Ed. 2d 1456, 1459, and footnote 6. This Court there repeated the distinction between a claim that the nonresident owns the intangible which the plaintiff seeks to have applied to satisfy the nonresident's obligations and attempts to litigate rival claims to the intangible.

The California Supreme Court stated that it could see no sense in that distinction made by this Court:

> "between jurisdiction to take over a nonresident's claim to a chose in action admittedly his and jurisdiction to establish that it was never his." (49 AC at 347)

California thus chooses to ignore the distinction that in one case the nonresident has nothing to litigate with respect to the intangible and the presence of the property, admittedly his, before the court permits the exercise of the state's coercive power to compel him to come in and defend against the application of that property to other obligations. In the rival claim situa-

tion, the issue is to determine rights in the intangible. Since an intangible is merely a relation between people, all the people involved must be before the court for jurisdiction to exist.

Every state court of last resort (except the California Supreme Court) which has passed upon the Constitutional issue here involved has, relying on *Dunlevy*, held that a rival claimant may not institute suit to litigate his rights in the intangible without personal service upon the other rival claimant. *Redzina* v. *Provident Institution*, 96 N.J. Eq. 346, 352-353, 125 Atl. 133, 136; *Austin* v. *Royal League*, 316 Ill. 188, 147 N.E. 106, 109; *Eisner* v. *Williams*, 298 Mich. 215, 220; *Williamson* v. *Falkenhagen*, 178 Minn. 379, 227 N.W. 429.

The California Supreme Court gave two reasons in justification of its decision. First, it declared that:

> "The obligation plaintiffs seek to enforce grows out of their employment by defendants here. The payments involved are alleged to be consideration for work performed in this state. The Federation defendant is before the Court. Under these circumstances, fairness to plaintiffs demands that they be able to reach the fruits of their labors before they are removed from the state." (49 AC at 348)

The remark about "fruits of their labors before they are removed from the state" is purely figurative. An injunction would operate on the debtors because they are doing business in California, but the payments are all made in New York largely from the debtors' bank accounts in New York. Thus, the injunction, if valid, would tie up monies which never were in California, but were always in New York and are payable in New

York pursuant to the terms of contracts made in New York between parties having their principal or sole offices in New York. Of the labor currently performed, which is here involved, two-thirds are performed in New York. And the suit is not predicated upon any transaction which the plaintiffs have had with the absent trustee, nor on any transaction within the State of California. What California in effect holds is that it will protect local interests, however tenuous the local contacts and whatever the hardship or unfairness to interests outside the state. It is one of the major purposes of the Fourteenth Amendment to prevent a state from reaching out and exercising jurisdiction beyond its own borders without the presence of adequate contacts within the state. It is precisely that purpose that California seeks to defeat.

The second justification given by California is that:

> "A remedy which a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead." (49 AC at 348)

Again, California has, in this remark, failed to recognize that its jurisdiction ends at its own borders. A federal court has such jurisdiction as Congress grants and, if Congress so wills, its process may run throughout the country. Congress represents the entire nation, while each state legislature represents but the people of its own state. That difference results in many Constitutional distinctions between what the nation may do and what a state may do. There is no justification for the attempt of the California Supreme Court to do away with the distinction insofar as the jurisdiction of courts are concerned.

Thus, the decision of the Supreme Court of California is in conflict with decisions of this Court and of every other state court of last resort which has considered this Constitutional issue, and the grounds advanced by the California court to justify its result are in conflict with the purposes of the Fourteenth Amendment. The questions presented are substantial and are of public importance.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

Filed Nov. 5, 1957

L.A. 24629

WILLIAM (BILL) ATKINSON, JACK BARSBY, ALFRED E. BRAIN, CLARENCE (PETE) CARPENTER, RUSSELL A. CHEEVER, HARRIET CRAWFORD, individually and on behalf of all other instrumental musicians similarly situated, *Petitioners,*

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, *Respondent.*

AMERICAN FEDERATION OF MUSICIANS, COLUMBIA BROADCASTING SYSTEM, et al., and LOEWS INCORPORATED, REPUBLIC PICTURES, et al., *Real Parties in Interest.*

L.A. 24630

JOHN H. ANDERSON, JR., BURNETT F. ATKINSON, ROBERT BAIN, EDWIN VANCE BEACH, ROLAND E. BUNDOCK, LAWRENCE B. BUNKER, GEORGE CALLENDER, individually and on behalf of all other instrumental musicians similarly situated, *Petitioners,*

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES, *Respondent.*

AMERICAN FEDERATION OF MUSICIANS, COLUMBIA BROADCASTING SYSTEM, et al., and LOEWS INCORPORATED, REPUBLIC PICTURES, et al., *Real Parties in Interest.*

Separate class actions were brought by two groups of musicians attacking the validity of collective bargaining contracts between their employers and the American Federation of Musicians and certain trust agreements related

thereto. One action is on behalf of the employees of various motion picture companies and the other is on behalf of the employees of various phonograph record companies. The gist of plaintiffs' complaints is that in violation of its duty as their collective bargaining agent and in fraud of their rights the Federation contracted with the employers that certain royalty payments and payments for reuse of motion pictures on television should be paid to a trustee for specified trust purposes instead of to the employees.

Plaintiffs allege that these payments constitute wages earned by the employees and that their diversion to the trust is violative of their rights; that the purpose of the trust is to contribute to the public knowledge and appreciation of music throughout the United States and Canada, and the trustee is authorized and directed to expend the trust funds in presenting personal performances by instrumental musicians to which the public is admitted without charge; that the trust arrangement diverts wages earned by California employees, members of Local No. 47, for the benefit of Federation members elsewhere without corresponding benefit to plaintiffs from the operation of similar arrangements made elsewhere; that the employers are willing to make the payments to their employees, but for their agreements with the Federation to make the payments to the trustee; and that the national executive officers of the Federation insisted on this arrangement for the selfish purpose of perpetuating themselves in office and of maintaining their hold and control over the affairs of the Federation and used the trust fund to win the support of officials of the Federation's locals and member musicians throughout the United States and Canada, who vastly outnumber plaintiffs and are not employed by the employers here involved.

In each action, the Federation, the trustee, and the respective employers are named as defendants. Plaintiffs

seek a declaration of the invalidity of the collective bargaining agreement and their right to the payments either as beneficiaries of a constructive trust or on the ground that the payments constitute wages withheld in violation of sections 222 and 224 of the Labor Code. They also seek damages against the Federation for breach of its duty to them. At the commencement of the actions they moved for the appointment of a receiver to collect the payments and preliminary injunctions to prevent the employers from making the payments to the trustee. The employers have been personally served with process in this state, and personal jurisdiction has been obtained over the Federation. The trustee was served pursuant to court order by delivery of summonses and complaints and motion papers within the State of New York, but he has not appeared.

The trial court held that insofar as plaintiffs sought to intercept the delivery of payments to the trustee by the appointment of a receiver and temporary injunctions, the trustee was an indispensable party and that the court had no jurisdiction to grant plaintiffs' motions for provisional relief without personal jurisdiction over the trustee. It was careful to point out that its ruling was based solely on lack of jurisdiction and stated that "if the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and perhaps the appointment of a receiver. . . ."

Some of the plaintiffs in each of the actions then filed their petitions for writs of mandate in the District Court of Appeal, Second Appellate District. The Second Division of that court issued alternative writs of mandate and after a hearing filed its decision in each case "commanding respondent superior court to assume and exercise jurisdiction over petitioners' application for preliminary injunction and appointment of receiver as prayed herein."

Petitions for hearing by the real parties in interest, the defendant employers and Federation, were then granted by this court.

The writ of mandate is an appropriate remedy unless an appeal from each order denying the motion for a preliminary injunction constitutes "a plain, speedy, and adequate remedy." (Code Civ. Proc., § 1086; Financial Indem. Co. v. Superior Court, 45 Cal. 2d 395, 399.) Petitioners alleged in their petitions before the District Court that the remedy by appeal was not adequate because of the necessity of prompt action to prevent further movement of funds out of the jurisdiction of the superior court. Since no purpose but delay would be served at this time by reviewing the District Court's decision that the remedy by appeal was inadequate, we accept it for the purposes of these proceedings. (Bowles v. Superior Court, 44 Cal. 2d 574, 582.)

We have concluded that personal service upon the trustee in New York was sufficient to give the court jurisdiction to adjudicate his right to receive payments under the contracts here involved. Code of Civil Procedure section 412 provides: "Where the person on whom service is to be made resides out of the State . . . and it . . . appears . . . that it is an action which relates to or the subject of which is real or personal property in this State, in which such person defendant . . . has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consist wholly or in part in excluding such person . . . from any interest therein, such court, or judge, may make an order that the service be made by the publication of the summons." Section 413 provides that personal service outside the state is equivalent to publication. Plaintiffs claim that the employers' obligation to make the payments involved is one owing to them instead of to the trustee. That obligation is a chose in action and is therefore personal property within the meaning of the

statutory provisions. (Code Civ. Proc., § 17 (3).) Being an intangible, it has no situs in fact. "An intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it." (Estate of Waits, 23 Cal. 2d 676, 680.) The question presented, therefore, is whether the chose in action in question may be treated as being within this state within the meaning of section 412 for purposes of exercising in rem or quasi in rem jurisdiction over it in these actions.

Plaintiffs rely on cases holding that having jurisdiction over the obligor, the state has power to enforce the obligation and cut off the right, if any, of a nonresident claimant thereto without personal jurisdiction over the nonresident. Garnishment proceedings (Harris v. Balk, 198 U.S. 215) and escheat proceedings (Standard Oil Co. v. New Jersey, 341 U.S. 428; Security Bank v. California, 263 U.S. 282) are examples of the exercise of such power. Defendants contend, however, that in the case of ordinary choses in action such power is limited to situations in which the local claimant admits the validity of the local debtor's obligation to the nonresident and seeks to reach the interest he admits is the property of the nonresident. They point out that in the present case plaintiffs are not seeking to reach property admittedly belonging to the trustee but are claiming that the obligation is owed only to them. Defendants rely on cases holding that the debtor cannot treat his own obligation as property where he is, when his purpose is to terminate a nonresident's claim against him (Vanderbilt v. Vanderbilt, 77 Sup. Ct. 1360; Estin v. Estin, 334 U.S. 541), and they contend that the rule is the same when the debtor seeks to interplead both a local and nonresident claimant. (N. Y. Life Ins. Co. v. Dunlevy, 241 U.S. 518.) In their view it is immaterial in an action to adjudicate conflicting claims to an obligation,

whether the action is commenced by the obligor, where only one of the claimants can be served, or is commenced by one of the claimants, where he can secure personal jurisdiction over the obligor but not over the rival claimant.

We find no controlling precedent of the United States Supreme Court. It is true that in the Dunlevy case creditors of one of the claimants to the insurance proceeds had garnisheed Mrs. Dunlevy's interest before the insurance company sought to interplead the local claimants with Mrs. Dunlevy who was absent, but the Court was careful to point out that the interpleader action "initiated by the company was an altogether different matter" from the garnishment proceedings and that under the applicable state law a judgment exonerating the garnishee was not binding on the absent debtor whose claim against the garnishee the local creditors had unsuccessfully attempted to reach. (241 U.S. 518, 520-521.) Defendants rely on language in Bank of Jasper v. First National Bank, 258 U.S. 112, 118-119, suggesting a distinction for jurisdictional purposes between an action to reach a debt owed an absent defendant and an action seeking to establish that the debt is owed directly to the plaintiff instead of to the absent claimant. In the Bank of Jasper case, however, the obligation had been embodied in a negotiable certificate of deposit that was not within the jurisdiction of the court, and the Supreme Court summarized its holding by stating that "As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder." Accordingly, that case is not controlling here where the obligation has not been embodied in a negotiable document.

Decisions of other courts involving conflicting claims to choses in action, where the action has been commenced by one claimant who has secured personal jurisdiction

over the debtor but not over the absent claimant, are in conflict as to whether there is jurisdiction to adjudicate the absent claimant's rights. See, e.g., sustaining or indicating jurisdiction: Cameron v. Penn. Mut. Life Ins. Co. [N. J. Eq.], 161 Atl. 55, 60; 173 Atl. 344, 346; Ely v. Hartford Life Ins. Co. [Ky.], 110 S.W. 265, 268; State v. Mueller [Mo. App.], 90 S.W. 2d 171, 174-176; Omaha Nat. Bank v. Federal Reserve Bank, 26 Fed. 2d 884, 887-889; Feuchtwanger v. Central Hanover Bank & Trust Co. [N. Y.], 43 N.E. 2d 434, 435; First Nat. Bank v. Bank of Horatio [Ark.], 255 S.W. 881, 882; Taylor v. Security Mut. Life Ins. Co., 77 N.Y.S. 1012, 1013; Oishei v. Pennsylvania R. Co., 102 N.Y.S. 368, 371, aff'd, 85 N.E. 1113; Morgan v. Mutual Benefit Life Ins. Co. [N. Y.], 82 N.E. 438, 441; Kumor v. Scottish Union & National Ins. Co. [Wyo.], 33 Pac. 2d 916, 920-922; Bush v. Missouri State Life Ins. Co. [Okla.], 207 Pac. 317, 319; Mutual Home Ass'n v. Zwatchka [Tex. Civ. App.], 297 S.W. 317, 318; Perry v. Young [Tenn.], 182 S.W. 577, 578; Sherman Nat. Bank v. Shubert Theatrical Co., 238 Fed. 225, 229; Morgan v. Mutual etc. Ins. Co., 16 Cal. App. 85. 90-93. Denying or indicating no jurisdiction: Mahr et al v. N.U.F. Ins. Soc., 127 N.Y. 452, 460-462; Kelly v. Norwich Union Fire Ins. Co. [Iowa], 47 N.W. 986, 987; Royal Neighbors of America v. Fletcher [Okla.], 227 Pac. 426, 429; Cross v. Armstrong [Ohio], 10 N.E. 160, 164-166; Washington Life Ins. Co. v. Gooding [Tex. Civ. App.], 49 S.W. 123, 127; Redzina v. Provident Inst. for Savings [N. J.], 125 Atl. 133, 136; McBride v. Garland [N. J. Eq.], 104 Atl. 435, 436; Austin v. Royal League [Ill.], 147 N.E. 106, 109; Schoenholz v. New York Life Ins. Co., 188 N.Y.S. 596; Eisner v. Williams [Mich.], 298 N.W. 507, 509-510; Stockbridge v. Phoenix Mut. Life Ins. Co., 193 Fed. 558, 560.)

In the absence of a settled rule governing the situation before us, and in light of the fact that an intangible may be subjected to the jurisdiction of the court without personal jurisdiction over all of the parties involved for some

purposes but not for others, we conclude that the solution must be sought in the general principles governing jurisdiction over persons and property rather than in an attempt to assign a fictional situs to intangibles.

It is significant that with respect to jurisdiction to tax intangibles (Curry v. McCanless, 307 U.S. 357, 373-374), jurisdiction over foreign corporations (Internat. Shoe Co. v. Washington, 326 U.S. 310, 316; Perkins v. Benguet Mining Co., 342 U.S. 347, 445), and jurisdiction to adjudicate trust obligations (Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 311-313), emphasis is no longer placed on actual or physical presence but on the bearing that local contacts have to the question of overall fair play and substantial justice. A similar change in emphasis has been taking place with respect to personal jurisdiction over individuals. (Cf., Pennoyer v. Neff, 95 U.S. 714; with Milliken v. Meyer, 311 U.S. 457, 462-463; Hess v. Pawloski, 274 U.S. 352; Allen v. Superior Court, 41 Cal. 2d 306, 310-313; Nelson v. Miller [Ill.], 143 N.E. 2d 673; see, Smyth v. Twin State Improvement Corp. [Vt.], 80 Atl. 2d 664.) "But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Internat. Shoe Co. v. Washington, supra, 326 U.S. 310, 316.)

In the present case, since the trustee is not and has not been a resident of California, section 417 of the Code of Civil Procedure precludes the entry of a personal judgment against him, and it is therefore unnecessary to determine whether his activities as trustee have sufficient connection with this state constitutionally to justify an assumption of personal jurisdiction without service or proc-

ess here. The relevant contacts with this state are significant, however, in deciding whether due process permits exercising a more limited or quasi in rem jurisdiction to determine his and plaintiffs' interests in the intangibles in question.

We find no relevance in the distinction defendants seek to make between jurisdiction to take over a nonresident's claim to a chose in action admittedly his and jurisdiction to establish that it was never his. In both situations the nonresident can protect his interest in the property only by submitting to the jurisdiction of the court. It is true that in the former situation he must litigate a controversy solely between himself and his creditor unrelated to pre-existing rights in the obligation garnished, whereas in the latter situation pre-existing conflicting rights to the obligation itself are involved; but this distinction alone has no bearing on the fairness of making him appear. It has been rejected in a case involving both real and personal property including intangibles (Loaiza v. Superior Court, 85 Cal. 11, 34-35), and does not exist with respect to controversies over corporate stock. (Jellenik v. Huron Copper Mining Co., 177 U.S. 1, 12-13; Wait v. Kern River Mining etc. Co., 157 Cal. 16, 21; Amparo Mining Co. v. Fidelity Trust Co. [N. J.], 73 Atl. 249, 250-251; Michigan Trust Co. v. Probasco [Ind. App.], 63 N.E. 255, 257.) It is true that for some purposes the state of incorporation may be peculiarly appropriate for the purpose of litigating conflicting claims to corporate stock, but if so, it is because of relevant contacts there; if such contacts exist elsewhere, jurisdiction also follows. (Wait v. Kern River Mining etc. Co., supra, 157 Cal. 16, 21.) Similarly, in the case of other intangibles, jurisdiction must be determined in the light of the totality of contacts with the state involved. Indeed, many of the apparently conflicting decisions on the question before us could be reconciled on their facts, if not their language, on this basis. (Cf., e.g., Omaha Nat. Bank v. Federal Reserve Bank, 26 Fed. 2d

884, 887, 889; Feuchtwanger v. Central Hanover Bank & Trust Co. [N. Y.], 43 N.E. 2d 434, 435; First Nat. Bank v. Bank of Horatio [Ark.], 255 S.W. 881, 882; Morgan v. Mutual Benefit Life Ins. Co. [N.Y.], 82 N.E. 438, 440-441; Kumor v. Scottish Union & National Ins. Co. [Wyo.], 33 Pac. 2d 916, 920-922; Perry v. Young [Tenn.], 182 S.W. 577, 578; with Maur et al v. N.U.F. Ins. Soc., 127 N.Y. 452, 460-462; Cross v. Armstrong [Ohio], 10 N.E. 160, 164; Eisner v. Williams [Mich.], 298 N.W. 507, 509-510.)

The present case is not one in which an obligor has invoked the jurisdiction of a court remote from the obligee solely for the purpose of terminating his obligation (see, Estin v. Estin, supra; Vanderbilt v. Vanderbilt, supra) or sought to compel conflicting claimants to adjudicate their rights in a forum of his own choice. (See, N. Y. Life Ins. Co. v. Dunlevy, supra.) The obligation plaintiffs seek to enforce grows out of their employment by defendants here. The payments involved are alleged to be consideration for work performed in this state. The Federation defendant is before the court. Under these circumstances, fairness to plaintiffs demands that they be able to reach the fruits of their labors before they are removed from the state. Moreover, fairness to the defendants who are personally before the court also demands that the conflicting claims of the trustee be subject to final adjudication. Even if we were to hold that his absence prevents the granting of the provisional remedies here sought, plaintiffs would not be foreclosed thereby from asserting that payment to him did not discharge the employers' obligation to them and that the Federation was independently liable for damages for breach of its fiduciary duty. The evil of exposing the obligor to actions to enforce the same obligation in two jurisdictions with the attendant risk of double liability would not be obviated. It was just such double liability that was sustained in the Dunlevy case and gave impetus to the passage of federal interpleader legislation. (See, Chafee, Interstate Interpleader, 33 Yale L. J. 685, 711.)

It is doubtful whether today the United States Supreme Court would deny to a state court the interstate interpleader jurisdiction that federal courts may exercise. A remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead. To sustain jurisdiction in these cases, however, we are not required to forecast the overruling of the Dunlevy case and to act on that basis. For the reasons stated above, this case is clearly distinguishable from the Dunlevy case, and the multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise quasi in rem jurisdiction over the intangibles in question.

Let the writ of mandate issue in each case commanding respondent superior court to assume and exercise jurisdiction over petitioners' application for a preliminary injunction and the appointment of a receiver as prayed herein.

TRAYNOR, J.

We Concur:

GIBSON, C. J.
SHENK, J.
CARTER, J.
SCHAUER, J.
SPENCE, J.
MCCOMB, J.

[Civ. No. 22272. Second Dist., Div. Two. Apr. 24, 1957.]

WILLIAM ATKINSON et al., *Petitioners*,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent*.

[Civ No. 22273. Second Dist., Div. Two. Apr. 24, 1957.]

JOHN H. ANDERSON, JR., *et al.*, *Petitioners*,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, *Respondent*.

(1) Mandamus—To Courts.—Mandamus is appropriate to compel the superior court to assume and exercise jurisdiction with respect to applications for preliminary injunction and appointment of a receiver.

(2) Process—Service by Publication—Nonresidents.—Due process is accorded a nonresident defendant whose property, situated within the forum of suit, is seized by the court, actually or constructively, either as the object of the action or in a proceeding ancillary thereto, when he is served by publication in such manner as to be calculated to give him reasonable notice of the opportunity and necessity of appearing and defending.

(3) Constitutional Law—Due Process.—The fundamental requisite of due process in judicial proceedings is opportunity to be heard.

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(2) See Cal. Jur., Process, Notices and Papers, § 25; Am. Jur., Process, § 73 et seq.

(3) See Cal. Jur. 2d, Constitutional Law, § 303 et seq.; Am. Jur., Constitutional Law, § 567 et seq.

McK. Dig. References: (1) Mandamus, §§ 44, 65; (2) Process, § 33; (3) Constitutional Law, § 169; (4) Constitutional Law, § 35; (5) Judgments, § 7(1); (6) Judgments, § 7(3); (7, 10-12, 15) Conflict of Laws, § 18; (8, 9) Process, § 27; (13, 14) Property, § 1.

(4) Id.—Service by Publication—Jurisdiction Acquired.—Jurisdiction acquired through substituted service extends only to property seized in the *forum rei sitae*, and if the action is originally *in personam*, a seizure, such as an attachment, converts it into one *quasi in rem* on failure of the nonresident defendant to appear, and narrows the proceeding to one directed at disposition of the property so drawn into the court's custody.

(5) Judgments — Prerequisites — Jurisdiction and process.—A nonresident's property within the court's jurisdiction and seized by the court, either as the object of the action or in an ancillary proceeding, is subject to the ensuing judgment, regardless of the fact that the nonresident may be an indispensable party or that he may have been served constructively.

(6a, 6b) Id.—Judgments on Substituted Service—Jurisdiction Over Res.—A debt owing by resident employers of musicians payable, under a labor agreement, to a nonresident trustee who had no apparent interest in the litigation except for his fees, and who refused to appear, constituted a sufficient res in this jurisdiction to sustain an order or judgment based on substituted service on the trustee in a controversy over ownership of that debt between the employees and employers, particularly where the convenience of all real parties in interest would be promoted by completion of the litigation in this jurisdiction, in which they reside and in which most of the documentary evidence and witnesses seem to be available.

(7) Conflict of Laws—Personal Property—Situs.—Being incorporeal, a debt is intrinsically incapable of a situs in fact.

(8) Process—Service by Publication—Adequacy.—The situs attributed to an intangible depends on what action

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(7) See Cal. Jur. 2d, Conflict of Laws, § 42 et seq.; Am. Jur., Conflict of Laws, § 65 et seq.

is to be taken with reference to it, and thus the adequacy of substituted service, so far as due process is concerned and with relation to the acquisition of jurisdiction over such intangible, is dependent on whether the form of service employed is reasonably calculated to give defendant actual notice of the proceedings and opportunity to be heard.

(9) Id.—Service by Publication—When Allowable.—A debtor can not select a remote forum, effect substituted service on his creditor and terminate his obligation through a judgment rendered at a place in which the creditor is not able to assert his rights.

(10) Conflict of Laws—Personal Property—Situs.—Once it is recognized that the doctrine that gives a particular situs to an intangible is a fiction created to meet the needs of practical justice, it must be further conceded that recognition of a special or segregated fund as a *res* is but one of the steps in the process of transition from corporeal to incorporeal property in the field of situs.

(11) Id.—Personal Property—Situs.—The presence of a special or segregated fund may be an aid, but it is not a *sine qua non* to recognition of situs of a debt at the domicile of the debtor, not only for the purpose of attachment or garnishment, but also as a jurisdictional predicate in any other situation in which the requirements of substantial justice demand recognition of such local situs.

(12) Id.—Personal Property—Situs.—The word "debt" when used in discussion of situs, necessarily includes the right of enforcement of the obligation which enforcement can occur only at the debtor's domicile or in such other place as service of process may be had on him, but it does not follow that it must be a recognized right, since a disputed claim may fall in the same category.

(13) Property—Choses in Action.—The right to recover a debt is a chose in action.

(14) Id.—Choses in Action.—A chose in action is a right which cannot be enforced without action, to receive or recover a debt or money, or damages for breach of contract or for a tort connected with a contract.

(15) Conflict of Laws—Personal Property—Situs.—Where situs is concerned, the obligation to pay and the right to collect are equivalents which reside at the place of available process on the debtor.

PROCEEDINGS in mandamus to compel the Superior Court of Los Angeles County to assume and exercise jurisdiction with respect to applications for preliminary injunction and appointment of receiver. Writ granted.

John W. Preston, Harold A. Fendler and Daniel A. Weber for Petitioners.

O'Melveny & Myers, Homer I. Mitchell, Charles C. Bakaly, Jr., Bodkin, Breslin & Luddy, Mitchell, Silberberg & Knupp, Loeb & Loeb and Averill C. Pasarow for Real Parties in Interest.

ASHBURN, J.—These petitions for writ of mandate present the same legal questions and were heard together, as were the actions in the superior court from which the present applications stem.

They deal with the elastic fictional concept of a jurisdictional res consisting of a debt or contract obligation, and require the determination of the situs to be imputed to it.

The claim of plaintiffs in each action is that defendant American Federation of Musicans of the United States and Canada, an international labor union, acting as their exclusive bargaining agent defrauded them by making agreements with their employers which divert to one Samuel R. Rosenbaum, as trustee, moneys earned and owing to plaintiffs as wages for services rendered. The trial court held that Rosenbaum, as trustee, is an indispensable party to

each action and, as he has not been served personally in this state, the court has no jurisdiction to grant a preliminary injunction or appoint a receiver as a means of sequestering and ultimately determining title to certain moneys confessedly owing by defendant employers and under their agreements payable to said Rosenbaum as trustee.

ATKINSON COMPLAINT

The Atkinson case is a representative action brought by 22 instrumental musicians on behalf of all such employees (about 2,400 in number) presently or previously hired by defendant motion picture companies. Defendants comprise four classes, (1) American Federation of Musicians of the United States and Canada (hereinafter designated as Federation), (2) numerous motion picture producing companies, e.g., Paramount Pictures Corporation, Loew's Incorporated; Republic Productions, Inc.; Republic Pictures Corporation, (3) numerous corporations engaged in telecasting motion pictures, and (4) Samuel R. Rosenbaum, as trustee.

It is alleged that defendant Federation is an international labor union, that plaintiffs are members of same and of its local known as Musicians' Mutual Protective Association Local No. 47, A. F of M.; that plaintiffs and those whom they represent are and were employed by defendant motion picture companies as musicians in production of pictures; that Federation is and was their exclusive bargaining agent and as such negotiated with employers the agreements involved in the action. Such agreements were made in 1952 and 1954 and provided that in the event of reuse of any motion pictures on television the employer should make certain "re-use payments" (as the pleader designates them) directly to the employee musicians of various classes, viz., $25 to a musician, $50 to a leader, $50 to a contractor, $75 to an arranger, and $25 to a copyist. Such reuse payments were intended and under-

stood to be "additional wages or compensation to the musicians involved."

Contemporaneously with said 1952 and 1954 agreements the defendant motion picture companies were required by Federation to enter into trust agreements with said Rosenbaum, as trustee, which required them to pay to him in that capacity 5 per cent of the gross revenues from the use of motion pictures on television (designated in the complaint as "royalty payments"), which said moneys were to constitute a "Music Performance Trust Fund" and be used in arranging the presentation of personal performances by instrumental musicians in such areas throughout the United States and Canada as in the judgment of the trustee would contribute to public knowledge and appreciation of music.

Reuse payments were made to the individual employees until June, 1955, when an amendatory agreement was made by Federation with the employer companies. This was done pursuant to resolution of the International Executive Board of Federation authorizing the president, James C. Petrillo, "to take such measures as he might deem fit to cause to be diverted from the plaintiffs to said trust fund the re-use payments aforesaid, upon the ostensible or alleged ground that the musicians who rendered their services in such motion pictures could not be located, well knowing that in truth and in fact said excuse was untrue and a sham, pretense and contrivance adopted by the Federation to effectuate their aims, purposes and intentions aforesaid and hereinafter alleged."[1] The 1955 agreement thus procured worked a diversion of all ac-

[1] The returns to the petitions for mandate in this court are demurrers; hence we must accept as true for present purposes all allegations of each petition; this is also true of each complaint below, for the presence or absence of a res in this jurisdiction must be determined from an inspection of plaintiffs' pleading (13 Cal. Jur. 2d, § 52, p. 538).

crued and future reuse payments into the trust fund held by Rosenbaum and above described. It is alleged that "Petrillo and the International Executive Board were actuated by the selfish aim and purpose of perpetuating themselves in office and of maintaining their hold and control over the affairs of the Federation; and in furtherance thereof, used the medium of such trust fund payments to win the support of officials of the Federation's locals and member musicians throughout the United States and Canada, who vastly outnumber the plaintiffs and who were not and are not employed by the motion picture companies, and who make little or no contribution whatever to said trust fund, but who nevertheless benefit as recipients of the trust fund payments made or to be made by the defendant trustee, and whose continued support was and is courted and coveted by Petrillo and the International Executive Board at plaintiff's expense in the manner aforesaid." Approximately $1,495,000 in reuse payments have been diverted from plaintiffs into said trust fund since June 15, 1955, and another $5,000,000 will be so diverted unless injunctive relief is granted, so it is alleged. The reuse payments received by the trustee average $175,000 a month. The trust instrument requires that 90 per cent of the existing fund, not already budgeted for expenditure, be disbursed during each period of 12 months. The number of musicians entitled to said reuse payments is approximately 2,400, and they comprise less than one per cent of the total Federation membership. "The entire membership of the Federation consists of approximately 260,000 members. Of this number, not more than 53,000 or less than 21% of the membership of the Federation depend for a livelihood solely upon musical employment and more than 50% of the total membership are not dependent wholly or in part, upon such employment; 35% or 88,000 depend for a livelihood entirely on non-musical activities; and 15.4% or 39,000 are fully retired."

Plaintiffs complain that a fraud has been committed upon them by their agent and a constructive trust in their favor exists with respect to moneys now due from defendant companies and remaining unpaid.[2] The petition avers that various companies stipulated at the hearing below that substantial sums of money owing by them had accrued prior to December 31, 1956, and remained unpaid. Also that Republic Productions, Inc., and Republic Pictures Corporation, conceded that the sum of $67,000 for reuse payments had accrued under their agreements, together with another $126,000 under the trust agreement, assuming its validity (apparently referring to "royalty payments"). All such moneys are payable under the agreement to trustee Rosenbaum who maintains his office in New York City and deposits all receipts in eastern and Canadian banks, none of it in California. The first cause of action[3] seeks declaratory judgment: "Declaring that the provisions thereof requiring the making of such re-use payments and royalty payments to the trust fund and the diversion thereof to the defendant trustee to be invalid and unlawful, including any and all proceedings and measures taken by the defendants in pursuance thereof; . . . Enjoining the defendant motion picture companies and television users from making any further wage increase payments or royalty payments to said trust fund or the defendant trustee; and requiring that the same be paid to those of the plaintiffs who are entitled thereto, or in the case of any deceased musician, to his widow or estate; . . . Requiring that during the pendency of this action

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[2] "The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents." (*Ford Motor Company* v. *Huffman*, 345 U. S. 330, 338 [73 S. Ct. 681, 97 L. Ed. 1048].) See also *Upholsterers' Intl. Union* v. *Leathercraft Furniture Co.*, 82 F. Supp. 570, 574.

[3] Other counts seeking recovery under sections 222 and 224, Labor Code, recovery of money on common counts and the like, do not enter into the problem presented by the first cause of action.

any and all such re-use payments or royalty payments in the possession, custody or control of the defendant trustee, or any which may be due or accrue hereafter be impounded; and that the defendant trustee and defendant motion picture companies and television users transmit the same to a receiver to be appointed by the Court for such purposes, or to pay the same directly into Court." Forty-seven defendant California corporations, 24 corporate defendants doing business in California but organized elsewhere, and five partnerships were personally served in this state. Rosenbaum, being resident in New York, was served pursuant to court order by delivery of summons and complaint and motion papers within the State of New York. He has not appeared.

Plaintiffs immediately sought a preliminary injunction against defendant motion picture companies making any payments, then or thereafter payable, to defendant Rosenbaum and moved for the appointment of a receiver to take into possession and control all funds and moneys then payable or thereafter payable to defendant, Rosenbaum, as trustee, under any or all of the above mentioned agreements, and for other injunctive relief.

As previously stated, the trial judge held that Rosenbaum is an indispensable party, without whose presence (in the absence of personal service) an injunction or receivership cannot be granted. This for the reason that the obligation owing from a defendant company, under its agreement, for accrued reuse payments does not constitute a res within this jurisdiction sufficient to support an action *in rem*, or *quasi in rem*.

Anderson Complaint

The Anderson complaint presents the same problems. Its averments closely parallel those of Atkinson. Some 91 instrumental musicians, employed by defendant recording companies in the producing of phonograph rec-

ords, bring a representative action on behalf of about 6,000 fellow workmen similarly situated. Defendants are Federation, some 87 recording companies doing business in California, and said Rosenbaum as trustee. Plaintiffs' membership in Federation and its Local No. 47 is alleged. It is also averred that Federation, as exclusive bargaining agent for musicians engaged in making recordings, effectuated in December, 1948, an agreement with defendant recording companies for a term ending December 31, 1953, which governed wages, hours and other conditions of employment and had a specific wage scale attached thereto. As a part of said 1948 negotiation the employers were required to enter into a trust agreement with Rosenbaum which bound them to pay to him, as trustee, for use as a Music Performance Trust Fund, certain percentages of their gross revenues derived from sales of recordings ("royalty payments"), said fund to be expended in the manner described in the above résumé of the Atkinson complaint.

In January, 1954, Federation, as such exclusive bargaining agent, negotiated with the employers for the grant of wage increases for the musicians (plaintiffs and those represented by them), urging that they were entitled to increases over the existing 1948 scale; the recording companies agreed to make wage increases of 10 per cent above the existing scale for the first two years of the new agreement, plus further increases aggregating 21 per cent above the existing scale for the last three years, i.e., from January 1, 1956 until December 31, 1958. It was orally agreed that these increases be paid directly to the musicians, but when the arrangement was reduced to writing Federation required the companies to enter into a trust agreement with defendant Rosenbaum bearing date of January 1, 1954, and providing for payment of moneys representing said increased wages into a fund which was substantially the equivalent of the Music Performance Trust Fund of the Atkinson case, to be disbursed in the

same manner and for the same purposes. The petition for mandate alleges: "During the negotiations for the 1954 phonograph record labor agreement, Mr. Conkling (then Vice President of Capitol Records) testified that the employers 'recognized the need for some increase to their musician employees'; that the defendant phonograph recording companies recognized the 'need to both reward them and maintain their morale in the studio' and to provide them with incentive 'but that under no circumstances could we consider any additional contributions to the fund' (Conkling Deposition, pages 48-50), but that Petrillo, as President of the defendant Federation 'more or less laid it on the line to us' and required as a condition to not calling a strike that the same amount of money which the defendant recording companies were willing to pay to their musician-employees as wage increases 'be paid to the trust fund instead of paying it directly to the musicians' (Conkling Deposition, pages 53-55); and that solely by reason of Petrillo's demand the defendant recording companies finally agreed to the 'application to the trust fund' of the musicians' wage increases, although the amounts paid to the trust fund are still reflected on the recording companies' books as 'cost for musicians' paid out in connection with the accompaniment of recording artists (Conkling Deposition, page 61)."

Since January, 1954, said moneys have been paid to the trustee and disbursed by him, and the employers have paid the musicians under the 1948 wage scale and nothing more. Approximately $1,737,900 of "wage increase payments" have been paid to said trustee and unless enjoined the companies will pay an additional $2,250,000 of such moneys to the trustee during the term of the 1954 contract. The petition further says it was stipulated below that various defendant recording companies owed substantial sums which were then payable; Fidelity and Specialty Records, Inc., conceded that it owed $9,000 which would be payable on February 15, 1957; Liberty Records, Inc.,

stated that $10,661.64 plus $6,731.98 had accrued under the agreements for the six months' period ending December 31, 1956. Plaintiffs and the musicians represented by them in the action comprise only 2½ per cent of the membership of Federation, and receive only a minimal indirect benefit from expenditure of said funds. It is alleged that all this was an abuse of the bargaining power by Federation, a fraud upon plaintiffs. Also, that "Federation so acted with the aim and purpose of, and it pursued a plan and scheme of, utilizing and bargaining power of the class or unit for whom the Federation was bargaining, i.e., the plaintiffs in this action, and of trading away the just wage and property interests of the plaintiffs for services actually rendered and to be rendered by them, for the purpose of benefiting others than the plaintiffs through the device of such trust fund payments; and the Federation abused its said duties and responsibilities and its said fiduciary relationship toward the plaintiffs in that all of the acts, omissions, measures and conduct on the part of the Federation hereinbefore and hereinafter alleged were motivated by the Federation's hostility and opposition to the plaintiffs and their interests . . . the Federation arbitrarily decided and decides whether or when wage increments or increases which the defendant recording companies were and are prepared to pay for the plaintiffs' services shall actually be paid to the plaintiffs or to the trust fund at the plaintiffs' expense, with virtually no corresponding benefits to the plaintiffs for such losses, either in the form of trust fund payments or otherwise."

The labor agreement, paragraph 14(a), provides that a breach of the trust instrument shall at the option of Federation render "of no further force and effect for the duration of your failure to perform such obligations," any of the provisions of the labor agreement. It is also provided in the same paragraph that the Federation shall have the right at all reasonable times to "examine and

audit your records and accounts concerning all transactions involving your sale of phonograph records which you shall keep pursuant to said Trust Agreement, and such other records and accounts as may be necessary;" all to the end of verifying and "determining the amount of payments due by you thereunder."

It fairly appears from the pleadings that control over the trust is tightly held by Federation; that Mr. Rosenbaum's personal interest extends only to the matter of his own fees; that the party having beneficial interest thereunder is Federation: This is likewise true of the trust involved in the Atkinson case.

The course of this case was the same as Atkinson. It appears that 32 defendant California corporations, 32 defendants doing business in California as individuals or partnerships, and 23 defendant corporations organized elsewhere but doing business in California, have been served or can be served in this jurisdiction. The prayer of the complaint seeks judgment: "'Declaring that the provisions of said 1954 phonograph record labor agreement and 1954 phonograph record trust agreement requiring the making of such wage increase payments and royalty payments to the trust fund and the diversion thereof to the defendant trustee are invalid and unlawful; . . . Adjudging that any and all of such wage increase payments hereafter accruing in connection with, or deriving from, the rendition of any services by the plaintiffs, are and shall be the property of, and shall belong to, those of the plaintiffs who have rendered such services in connection with such phonograph recordings made pursuant to said 1954 phonograph record labor agreement, and adjudging that the plaintiffs have a property right therein." Plaintiffs sought a preliminary injunction and the appointment of a receiver, both of which were denied by the trial judge solely because of his conclusion that jurisdiction is lacking due to failure to serve defendant Rosen-

baum within the State of California. In so ruling the court said that "if the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and perhaps the appointment of a receiver."

THE LAW

(1) The instant petitions seek mandate commanding the superior court to assume and exercise jurisdiction with respect to the applications for preliminary injunction and appointment of a receiver. Mandamus is the appropriate remedy (*Financial Indem. Co.* v. *Superior Court*, 45 Cal. 2d 395, 399 (289 P. 2d 233)) and we therefore proceed to the merits.

(2) Since *Pennoyer* v. *Neff*, 95 U.S. 714 (24 L. Ed. 565), was decided in 1878, and indeed before that time (see *Cooper* v. *Reynolds*, (1870) 10 Wall. (U.S.) 308 (19 L. Ed. 931)), it was and has been recognized that due process (as reflected in the Fourteenth Amendment and independently thereof) has been accorded a nonresident defendant whose property, situated within the forum of suit, has been seized by the court, actually or constructively, either as the object of the action or in a proceeding such as attachment ancillary thereto, when he has been served by publication in such manner as to be calculated to give him reasonable notice of the opportunity and necessity of appearing and defending. (3) "The fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard." (*Baker* v. *Baker, Eccles & Co.*, 242 U.S. 394, 403 (37 S.Ct. 152, 61 L.Ed. 386).) (4) But the jurisdiction so acquired through substituted service extends only to property thus seized in the *forum rei sitae*. If the action is originally in personam, a seizure such as an attachment converts it into one *quasi in rem* upon failure of the nonresident defendent to appear, and narrows the proceeding to one directed at disposition of the

property so drawn into the custody of the court. Quoting from the Cooper case, *supra*, *Pennoyer v. Neff*, *supra*, says at page 725: " 'If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court.

" 'But if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature a proceeding in rem, the only effect of which is to subject the property attached, to the payment of the demand which the court may find to be due to the plaintiff.' "

(5) The property within the jurisdiction and so seized is subject to the judgment and the owner is bound by it so far as disposition of that property is concerned. The fact that he is an indispensable party or that he has been served constructively becomes inconsequential.

In the instant cases the res which will sustain constructive service on defendant Rosenbaum must be found if at all, in the contractual obligation of the employer defendants and accrued payments due and to become due thereunder. It is admitted that there are substantial sums now owing by employer defendants who are within this jurisdiction, able and ready to pay the same. Witness the stipulation that the Republic defendants are holding $67,000 and $126,000 which will be paid to the trustee if the agreement so to do is held valid. (6a) The problem at bar reduces itself to the question whether a debt owing by a resident and payable to a nonresident who refuses to appear is a res within this jurisdiction of such substantiality as to support a judgment disposing of that debt upon the basis of constructive service. Defendants assert that it is not, because plaintiffs seek to establish a right to same which resides in themselves as a result of the

fraud practiced upon them and do not claim under or through the absent trustee. They assert that an attachment of the debt in an action against the absentee claimant would be valid and to the extent of that property would sustain a judgment based upon the constructive seizure. They argue that this is so because the attaching creditor claims under and through the absentee and admits he is the owner of the debt. They say that the rule does not apply when the plaintiff asserts a right in himself adverse to the nonresident claimant and seeks an adjudication that he, the plaintiff, is the true owner of the debt. The basis of the distinction is not clear on principle and rests upon a ruling of the United States Supreme Court in an interpleader suit later discussed herein (*New York L. Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (36 S.Ct. 613, 60 L. Ed. 1140)). According to defendants we have a res within this jurisdiction in the one instance and no res in the other.

(7) Being incorporeal, a debt is intrinsically incapable of a situs in fact. This is generally recognized in the authorities, which by a process of inclusion and exclusion have attributed a fictional situs to the debt or refused to do so according to the demands of practical justice in specific factual situations. "An intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it." (*Estate of Waits*, 23 Cal. 2d 676, 680 (146 P. 2d 5).) This last sentence explains the disparity in the decided cases.

The fictional nature of the situs of a debt has been recognized repeatedly by decisions of the United States Supreme Court which pass upon the presence or absence of due process.

Harris v, *Bulk*, 198 U.S. 215 (25 S. Ct. 625, 49 L. Ed. 1023), holds that a debt may be attached not only at the domicile of the debtor but also in any jurisdiction where

effective personal service of process may be made upon him. At page 223 the court said: "In such case the situs is unimportant. It is not a question of possession in the foreign state, for possession cannot be taken of a debt or of the obligation to pay it, as tangible property might be taken possession of. Notice to the debtor (garnishee) of the commencement of the suit, and notice not to pay to his creditor, is all that can be given, whether the garnishee be a mere casual and temporary comer, or a resident of the state where the attachment is laid."

Chicago, R. I. & P. R. Co. v. *Sturm*, 174 U.S. 710, 715 (19 S. Ct. 797, 43 L. Ed. 1144): "The essential service of foreign attachment laws it to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors To do it you must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*."

Propper v. *Clark*, 337 U.S. 472, 488 (69 S. Ct. 1333, 93 L. Ed. 1480). Discussing a receivership of certain royalties owed by a resident of New York to a nonresident, the court said "*Pennoyer* v. *Neff* merely holds that a personal judgment cannot be obtained against a nonresident on service by publication. It recognizes at p. 733 that for an *in rem* action it is sufficient that the property be within the state, subject to the control of the Court, and that there be some form of service which is reasonably calculated to give notice to parties whose interests may be affected by the judgment. [Citations.] The first requirement can be met in other ways than seizure of title, e.g., by an injunction against transfer of the property [citations]; by an attachment [citation]; or by personal service on the

party holding the property within the state [citations]. We have no doubt that where property is in a state and comes under the control of a court, as here by appointment of the temporary receiver, it is fair to permit substituted service."

In *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428 (71 S. Ct. 822, 95 L. Ed. 1078), it appeared that certain shares of stock in Standard Oil Company, a new Jersey corporation, and certain unpaid dividends declared thereon, had been adjudged escheated to the State because the owners and their addresses were unknown for 14 successive years. The company appealed, claiming among other things that the property had no situs in New Jersey for purpose of escheat; that since the property could not be seized or escheated the company would remain liable to its stockholders (creditors) and a requirement of payment of the dividends to the State would deny due process. The court said at page 438: "Appellant is a corporation of New Jersey, amenable to process through its designated agent at its registered office. [Citations.] This gave New Jersey power to seize the res here involved, to wit, the 'debts or demands due to the escheated estate.' . . . That power to seize the debt by jurisdiction over the debtor provides not only the basis for notice to the absent owner but also for taking over the debt from the debtor. [Citations.] It is true that fiction plays a part in the jurisprudential concept of control over intangibles. There is no fiction, however, in the fact that choses in action, stock certificates and dividends held by the corporation, are property. Whether such property has its situs with the obligor or the obligee or for some purposes with both has given rise to diverse views in this Court.

"We see no reason to doubt that where the debtor and creditor are within the jurisdiction of a court, that court has constitutional power to deal with the debt. Since choses in action have no spatial or tangible existence, con-

trol over them can 'only arise from control or power over the persons whose relationships are the source of the rights and obligations.' [Citations.] Situs of an intangible is fictional but control over parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible. Since such power exists through the state's jurisdiction of the parties whose dealings have created the chose in action, we need not rely on the concept that the asset represented by the certificate or dividend is where the obligor is found. The rights of the owners of the stock and dividends come within the reach of the court by the notice, i.e., service by publication; the rights of the appellant by personal service. That power enables the escheating state to compel the issue of the certificates or payment of the dividends."

Security Sav. Bank v. *California,* 263 U.S. 282 (44 S. Ct. 108, 68 L. Ed. 301, 31 A.L.R. 391). Escheat of unclaimed bank deposits. The court said at page 285: "Over this intangible property the state has the same dominion that it has over tangible property." Also, at page 287: "These are generally considered proceedings strictly in rem. But whether the proceedings should be described as being in rem or as being quasi in rem is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the res at the commencement of the suit; and reasonable notice and opportunity to be heard. [Citations.] These requirements are satisfied by the procedure prescribed in the statutes of California. There is a seizure or its equivalent. And the published summons to the depositors named as parties defendant is supplemented by the notice directed to all claimants whomsoever. Moreover, there is no constitutional objection to considering the proceeding as in personam, so far as concerns the bank; as quasi in rem, so far as concerns the depositors; and as strictly in rem, so far as concerns other claimants."

(8) It must be recognized that the situs attributed to an intangible "depends on what action is to be taken with reference to it" (*Estate of Waits, supra,* 23 Cal. 2d 676, 680), and that the adequacy of substituted service "so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him [defendant] actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice [citation] implicit in due process are satisfied." (*Milliken* v. *Meyer,* 311 U.S. 457, 463 (61 S. Ct. 339, 85 L. Ed. 278, 132 A.L.R. 1357).)

In conformity with these basic principles California statutes and cases have recognized the propriety of substituted service in cases in which plaintiff seeks to establish his right to a local asset which will be paid or delivered to a nonresident claimant unless an injunction is granted or a receiver appointed.

Section 17, subdivision 3, Code of Civil Procedure provides: "The words 'personal property' include money, goods, chattels, *things in action,* and evidences of debt." Section 412 of the same code authorizes substituted service upon a non-resident in an action "which relates to or the subject of which is real *or personal property* in this State, in which such person . . . *has or claims* a lien or *interest,* actual or contingent, therein, or in which the relief demanded consists wholly or in part in *excluding such person . . . from any interest therein . . .*" (Emphasis added.)

Loaiza v. *Superior Court,* 85 Cal. 11 (24 P. 707, 20 Am. St. Rep. 197, 9 L.R.A. 376), dealt with money and securities held in California by Loaiza as agent of two persons named Aguayos who were residents of Mexico. Two English corporations sued in the California superior court to effect a rescission of a purchase from the Aguayos of certain mining properties situate in Mexico, the rescission

being based upon alleged fraud. Loaiza and the two Aguayos were made defendants. The Aguayos being non-residents and not served in person or appearing, an order was made enjoining the transfer of the money and securities to them by Loaiza and appointing a receiver of said property. The order was challenged on certiorari as one made without jurisdiction. After discussion of *Pennoyer* v. *Neff, supra,* 95 U.S. 714, and various other authorities, the court denied the writ and said at page 34: "And the real and primary purpose of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud.

"Our statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. (Civ. Code, § 2224.) This being so, it cannot be that the arm of equity is so short or so weak that the fraudulent trustee,—he who has become trustee by fraud,—by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded *cestui que trust.*" This case was not concerned with a mere debt owing by a domiciliary because "[m]ost of those moneys, or the securities in which they have been invested, and the other things of value which were so given, are all ear-marked, so that they can be traced and identified, and were within the jurisdiction and are now within the possession of the court in which the action was brought." (P. 31.) The decision supports the proposition that determination of adverse claims to any res having situs within the jurisdiction affords proper occasion for substituted service upon an absentee claimant.

Murray v. *Murray*, 115 Cal. 266 (47 P. 37, 56 Am. St. Rep. 97, 37 L.R.A. 626), was an action for maintenance without divorce; plaintiff also sought to set aside as fraudulent certain transfers made by defendant Owen Murray to his brother, James Murray, who was also made a defendant. Both of them being absent from the jurisdiction, service was made by publication. The property involved consisted of mortgage notes and real estate. A receiver was appointed. The transfers were adjudged to be fraudulent and were set aside. Upon appeal the jurisdiction was attacked but the court upheld it upon the theory that the receiver's possession of the property was a seizure which formed valid basis for constructive service and a judgment binding that specific property. To that end the receivership was analogized to an attachment (p. 276). Here again the Supreme Court committed itself to the doctrine that determination of conflicting claims to a res found within the jurisdiction is proper though based on constructive service of the absent claimant. *Nichols* v. *Superior Court*, 1 Cal. 2d 589 (36 P. 2d 380, 95 A.L.R. 894), makes substantially the same holding, relying upon *Murray* v. *Murray*, *supra*, as good precedent.

Although the foregoing decisions had no occasion to apply their doctrine to a mere chose in action, a debt owing by a resident, that step was taken by the district court of appeal in *Standard Dredging Co.* v. *Title Ins. etc. Co.*, 96 Cal. App. 93 (273 P. 871). Title Insurance and Trust Company was trustee under an agreement securing certain collateral trust notes; the funds for redemption had been deposited with it and the land reconveyed. Plaintiff sued the title company, Mrs. Kendall Morgan and George C. Morgan, Jr., alleging that it owned certain of the notes and that they had been delivered to Morgan, Jr., as its agent; that he disobeyed his instructions and never returned the notes which came into possession of Mrs. Kendall Morgan. Plaintiff sought judgment against the title company for the amount of the funds alleged to be

owing to it (offering to give the company adequate indemnity), and served the two Morgans by publication under court order. Mrs. Kendall Morgan appeared and claimed ownership of the note and a right to the funds in the hands of the trustee. The trustee took the position that George C. Morgan, Jr. was a necessary party; "that he is not within the state of California and therefore the court has no jurisdiction of any property or any choses in action belonging to such defendant." (P. 96.) On this ground the court granted a nonsuit, which was reversed on appeal. The reviewing court relied upon *Pennington* v. *Fourth Nat. Bank*, 243 U.S. 269 (37 S. Ct. 282, 61 L. Ed. 713), among others,—a case discussed *infra*. The title company had control over an intangible, a debt owing to the owner of the notes, and the case held that that was a res within this state sufficient to sustain a valid judgment determining ownership of the same after service of the nonresident claimant by publication. At page 97 the court quotes from *Cooper* v. *Reynolds, supra*, 77 U.S. (10 Wall.) 317 (19 L. Ed. 931): " 'So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court, . . . The service of the summons on the bank is, under the doctrine thus established, the equivalent of a seizure of the property of each depositor in his account with the bank and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings *quasi in rem.*' " It also quotes *Security Sav. Bank* v. *California, supra*, 263 U.S. 282, as follows: " 'Seizure of the deposit is effected by the personal service made upon the bank. (*Provident Inst. for Savings* v. *Malone*, 221 U.S. 660 (34 L.R.A. N.S. 1129, 55 L. Ed. 899, 31 S. Ct. 661).) Thereby the *res* is subjected to the jurisdiction of the court.' " (See also, *McElroy* v. *McElroy*, 32 Cal. 2d 828, 831-832 (198 P. 2d 683).)

Pennington v. *Fourth Nat. Bank, supra,* 243 U.S. 269, was a divorce action in which the wife, in order to insure payment of alimony, joined the bank in which defendant had an account; the court made a preliminary injunction against the bank paying out any portion of the deposit; finally it was ordered to pay the whole thereof to plaintiff wife, and that was done. The husband later presented his check for payment, it was dishonored, and he sued the bank claiming that the orders of the divorce court were void for want of jurisdiction because he was a nonresident and had been served by publication only. This contention was rejected, the court saying in part: "The 14th Amendment did not, in guarantying due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a nonresident—of which bank deposits are an example—is property within the state. . . . The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is *an admitted indebtedness or a contested claim.* It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt,—that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized." (P. 271.) (Emphasis added.)

Omaha Nat. Bank v. *Federal Reserve Bank*, (8 C.C.A.) 26 F. 2d 884. The trial court dismissed the action for want of jurisdiction, the Circuit Court of Appeals reversed and the Supreme Court denied certiorari in 278 U.S. 615. The action was brought under section 57 of the Judicial Code (28 U.S.C.A. § 118) by Omaha National Bank of Omaha, Nebraska, against Federal Reserve Bank of Kansas City, Missouri; Wyoming National Bank of Casper, Wyoming; First National Bank of Cheyenne, Wyoming, and T. E. McClintock as receiver of the last named bank. The said section deals with local actions and, as stated by the court, requires not only diversity of citizenship but another indispensable showing, namely, "that the subject-matter, the res, is within the territorial jurisdiction of the court." The court said that the purpose of the suit was to enable plaintiff "to obtain a judgment or decree that will bind the res, though the defendants are all nonresidents and cannot be personally bound unless they enter general appearance or should be served within the district." (P. 885.) Plaintiff, claiming to have been defrauded by Wyoming National Bank of Casper, and having given notice of rescission (p. 887), sought to enforce an equitable title to funds on deposit with Omaha Branch of Federal Reserve Bank of Kansas City, Missouri. The action was brought in the District of Nebraska wherein defendant Federal Reserve Bank was doing business. Plaintiff sought an injunction against payment of said deposit to the Wyoming National Bank and prayed judgment to the effect that the deposit should be paid to it. The court held that there was a constructive trust of the deposit due to the fraud in its acquisition (p. 887). It was contended that there was no res within the jurisdiction of the court. At page 888 the opinion says: "In every practical and business sense the $60,000 is there, and it is a sacrifice of substance to form to say it is not. For remedial purposes on plaintiff's bill we think the situs of any property interest in the transferred deposit was at Omaha." This language is

followed by citation and quotation of various cases, including *C.R.I. & P. Ry. Co.* v. *Sturm, supra*, 174 U.S. 710, and *Pennington* v. *Fourth Nat. Bank, supra*, 243 U.S. 269. The case is essentially four-square with the one at bar, for it recognizes a debt owing by a resident company as a res within the jurisdiction of his residence, a res which will support substituted service in an action brought and maintained for the purpose of adjudicating adverse interests thereto, one of the claimants being a nonresident.

Respondents rely principally upon *New York L. Ins. Co.* v. *Dunlevy, supra*, 241 U.S. 518. Effie J. Gould Dunlevy recovered from New York Life Insurance Company the surrender value of a life insurance policy which she claimed to have been assigned to her; the judgment was rendered by the California superior court. The insurance company claimed res judicata on the basis of a judgment rendered by a state court of Pennsylvania. The policy was a tontine which had matured and the company recognized an obligation to pay the sum of $2,479.70 to one of two adverse claimants, either Mrs. Dunlevy or her father, Joseph W. Gould. So it brought an interpleader action in Pennsylvania, deposited the money in court, personally served Gould who lived in the state, and served Mrs. Dunlevy by publication, as she resided in California. She defaulted and judgment was rendered in favor of Gould. On appeal from the later California judgment it was held that there was no res judicata because the Pennsylvania judgment was void as to Mrs. Dunlevy for want of personal jurisdiction over her. Speaking of a certain judgment which Boggs & Buhl had recovered against Mrs. Dunlevy, based on valid personal service, the court, through Mr. Justice McReynolds, said at page 520; "Beyond doubt, without the necessity of further personal service of process upon Mrs. Dunlevy the court of common pleas at Pittsburgh had ample power through garnishment proceedings to inquire whether she held a valid claim against the insurance company, and, if found to exist, then to condemn

and appropriate it so far as necessary to discharge the original judgment. Although herself outside the limits of the state, such disposition of the property would have been binding on her. . . . But the interpleader initiated by the company was an altogether different matter. This was an attempt to bring about a final and conclusive adjudication of her personal rights, not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court, and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. *Pennoyer* v. *Neff*, 95 U.S. 714 (24 L. Ed. 565); Shinn, Attachment & Garnishment, § 674. See *Cross* v. *Armstrong*, 44 Ohio St. 613, 623, 625 (10 N.E. 160). . . . The established general rule is that any personal judgment which a state court may render against one who did not voluntarily submit to its jurisdiction, and who is not a citizen of the state, nor served with process within its borders, no matter what the mode of service, is void, because the court had no jurisdiction over his person." It was not held that there was no res in Pennsylvania; that question was not discussed. The citation of the Ohio case of *Cross* v. *Armstrong*, 44 Ohio St. 613 (10 N.E. 160), indicates that what Mr. Justice McReynolds had in mind was the proposition that an interpleader action is essentially in personam and cannot be converted into a proceeding in rem by deposit of the disputed money in court. In the Cross case, *supra*, it is said at page 165: "The proceeding was clearly one of interpleader, and that only. We do not understand that an action *in personam* simply because a debtor brings money, the right to recover which is in contention, and gives to the custody of the court a sum sufficient to discharge his debt, changes into an action *in rem*, or that an interpleader suit is, in its nature, a proceeding *in rem*. In the Philadelphia case the company could have begun the action by original bill, and obtained a complete standing in court, if, with other proper averments, the pleader had alleged a willing-

ness to bring the money into court. Manifestly, the action thus begun would not have been *in rem*. Then, does the mere fact that the company, (the debtor,) being sued, voluntarily delivers money to the clerk of the court, rather than keep it in its own safe, or to its credit in bank, or loaned upon call, change the action from one *in personam* to one *in rem*? We think not."

The Dunlevy case has been cited from time to time as support for a rule that the presence of an intangible within the forum does not authorize a determination of the rights of the creditor thereto unless personal service is had upon him within the jurisdiction. This is exemplified by *Estin* v. *Estin*, 334 U.S. 541 (68 S. Ct. 1213, 92 L. Ed. ——, 1 A.L.R. 2d 1412), which considered the effect of a Nevada default divorce upon a previous New York decree for separation and maintenance. At page 548: "Jurisdiction over a debtor is sufficient to give the State of his domicile some control over the debt which he owes. It can, for example, levy a tax on its transfer by will [citation], appropriate it through garnishment or attachment [citations], collect it and administer it for the benefit of creditors. [Citations.] But we are aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding. The existence of any such power has been repeatedly denied. *Pennoyer* v. *Neff*, 95 U.S. 714 (24 L. Ed. 565); *Hart* v. *Sansom*, 110 U.S. 151 (28 L. Ed. 101, 3 S. Ct. 586); *New York L. Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (60 L. Ed. 1140, 36 S. Ct. 613)." But general statements such as this, divorced from the actual ruling, do not advance the inquiry very far. The holding in Estin is that the husband, by taking up residence in Nevada, could not serve the wife by publication and there rid himself of his existing obligations to her through a default judgment. (9) That is but an expression of the self-evident truth that a debtor cannot select a remote forum,

effect substituted service upon his creditor and terminate his obligation through a judgment renderd at a place where the creditor is not able to assert his rights. In such a proceeding there is no res at the forum because the ends of practical justice forbid, rather than promote, extension of the fictional intangible res to the jurisdiction so selected by the plaintiff. The basic difficulty faced by the insurance company in the Dunlevy case, *supra*, was that it was attempting to select its own jurisdiction for an elimination of claims of remote nonresidents to the debt owing by it.

The actual effect of the Dunlevy holding is that a debtor cannot pick his own forum for determination of conflicting claims to the debt owed by him. The case does not hold (and the question seems not to have been presented) that one claimant cannot sequester such property at the domicile of the debtor and there determine the validity of his claim as against another claimant who is a nonresident and served by publication only. Nor does it hold that it is essential to the existence of a jurisdictional res at the domicile of the debtor that the claimant who has sequestered the debt must claim under the nominal creditor (as in attachment), rather than assert a claim in his own right.

So far as it was able to do so, and as a practical matter, Congress reversed the policy of the Dunlevy ruling of 1916 by passage of the Federal Interpleader Act in 1917 (39 Stat. 929, chap. 113), which provided a remedy for insurance companies and fraternal societies enabling them to maintain in the federal courts interpleader actions where one or more citizens, resident in the territorial jurisdiction of the court, claim adversely to one or more citizens of another state insurance moneys which the company or society concedes to be payable. The statute was amended in 1925, 1926, 1936, 1948 and 1949. In its present form (28 U.S.C.A. §§ 1335, 1397, 2361), it is available to any person, firm or corporation having money or prop-

erty of $500 or more payable to adverse claimants who are citizens of different states. (See annos. in 106 A.L.R. 626 and 17 A.L.R. 2d 741.)[4]

The Dunlevy case, *supra*, has not been applied to a situation such as that presented at bar. Although it was not cited in the opinion in *Omaha Nat. Bank* v. *Federal Reserve Bank, supra*, 26 F. 2d 884, that ruling, made in 1928, impliedly supports the view that Dunlevy does not control a controversy such as we have here.

It is interesting to note that some of the state courts have had no difficulty in finding a res within the court's jurisdiction in an action brought against a resident insurance company to determine the right to proceeds of a policy where the adverse claimant is a nonresident who has been served by publication only. See *State ex rel. Richardson* v. *Mueller*, 230 Mo. App. 962 (90 S.W. 2d 171, 174); *Oishei* v. *Pennsylvania R. R. Co.*, 117 App. Div. 110 (102 N.Y.S. 368, 371); 191 N.Y. 544 (85 N.E. 1113); *Morgan* v. *Mutual Benefit Life Ins. Co.*, 189 N.Y. 447 (82 N.E. 438, 440); *Kumor* v. *Scottish Union & Nat. Ins. Co.*, 47 Wyo. 174 (33 P. 2d 916, 920-921); *Taylor* v. *Security Mut. Life Ins. Co.*, 38 Misc. 575 (77 N.Y.S. 1012).

Respondents place considerable reliance upon *Bank of Jasper* v. *First Nat. Bank*, 258 U.S. 112 (42 S. Ct. 202, 66 L. Ed. 490). Bank of Jasper, incorporated and doing business in Florida, had received certain funds in a general deposit but had immediately issued against same certificates of deposit which absorbed the entire credit; the certificates became the property of First National Bank of Rome, Georgia. It sued the Jasper bank on these obligations and was met by the plea of res judicata based upon judgments obtained against that bank in Florida in

[4] The fear expressed by defendant employers that they will be subjected to double payment, as in the Dunlevy case, probably could have been obviated by invoking this Federal Interpleader Act.

suits brought by persons who claimed to have been defrauded and sought to impress a trust upon the debts represented by the certificates; there had been no personal service upon the Georgia bank in the State of Florida, merely constructive service followed by nonappearance of this nonresident defendant. It was held that there was no res judicata because there was no jurisdiction over the defendant or any of its property. At page 119 the court said: "The contention that the proceeds of the discounts of the notes constitute a res within the state, of which the certificates of deposit were merely evidence, rests upon a misapprehension. No specific fund was ever set apart by the Jasper bank. Its discounts resulted in general credits by the bank to the makers of the notes. . . . The credits—called deposits—so transferred, became an indebtedness of the Jasper bank to the American Company. That indebtedness, if it had rested in open account, would have been property of the creditor within the state of Florida. In an appropriate proceeding it might have been reached to satisfy a claim against its owner. *Pennington* v. *Fourth Nat. Bank*, 243 U.S. 269 (61 L. Ed. 713, L.R.A. 1917F 1159, 37 Sup. Ct. 282). But the suits in the state court were not proceedings of that character. In them the camplainant asserted that, by reason of the fraud alleged, the Jasper bank was indebted not to any of its co-respondents but to the complainant. Moreover, there was no indebtedness on open account to any of the Georgia corporations; for this account had been closed by giving certificates of deposit; and these had been transferred to the First National Bank. . . . As neither the certificates of deposit nor the holder thereof were within the state of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder."

We apprehend that the reference to a specific fund, found in this and certain other cases, does not point to a controlling factor in the problem of presence or absence of

a res. The court did not hold that a specific fund in Florida was essential to a res; it merely remarked upon the absence of one in taking the step to its further statement (probably dictum) that the indebtedness "if it had rested in open account, would have been property of the creditor within the state of Florida." The credit having been converted into a negotiable instrument which had an actual situs in Georgia, the court held that there was no res and hence no basis for a Florida judgment *in rem* or *quasi in rem*.

(10, 11) Once it is recognized that the doctrine which gives a particular situs to an intangible is a fiction created to meet the needs of practical justice it must be further conceded that the recognition of a special or segregated fund as a res is but one of the steps in the process of transition from corporeal to incorporeal property in the field of situs; that the presence of a special or segregated fund may be an aid but it is not a *sine qua non* to the recognition of situs of a debt at the domicile of the debtor,—not only for the purpose of attachment or garnishment, but also as a jurisdictional predicate in any other situation where the requirements of substantial justice demand the recognition of such local situs.

That a special or segregated fund is not of the essence of situs of an intangible is recognized in *State* v. *Security Savings Bank*, 186 Cal. 419 (199 P. 791) (affirmed in 263 U.S. 282, *supra*). Considering the question of due process in a proceeding for escheat of bank deposits, the court, after quoting the statute, said: "This language, if taken literally according to its legal significance, would be appropriate to describe money in the custody of the bank as bailee of its depositors. It is evident, however, from the context and from the purpose and object to be accomplished, that it was not intended to apply exclusively to moneys held by the bank as such custodian or bailee, although possibly it might include such special deposits.

It is not an accurate use of language to speak of the general deposits in an ordinary bank as the money of the depositors. When a general deposit is made with a bank, the title to the money delivered to it passes at once to the bank. The relation thereby established between the bank and the depositor is that of debtor and creditor and not that of bailee and bailor. The bank is the debtor and the depositor the creditor to the amount of the deposit. It is of some importance, in view of the argument presented, to note that the statutes in question do not provide for an actual seizure of any money, either before or after the judgment, but do provide, with respect to each depositor, for the payment to the state by the bank of the debt the bank owes to the depositor." (P. 423.) "The argument of the appellant on this subject is mainly based on the proposition that the proceeding authorized by section 1273 is an action *in personam* and that the judgment therein to be rendered is a personal judgment against the bank and the several depositors made defendants therein. This proposition is not maintainable. The judgment does not seek to declare or enforce any obligation of the depositors or any of them to any other person or persons. Its sole object with respect to them is to act upon the obligations they respectively hold against the bank, to effect a substitution of the state for the bank with respect to such obligation, and to transfer the title of that particular property of the depositors, respectively, to the state. Such proceedings are not proceedings strictly *in rem;* but they are proceedings *quasi in rem.* The proceeding is not in that respect distinguishable from an ordinary garnishee process against a debtor of a defendant to appropriate the debt to the payment of the plaintiff's demand. In such cases the defendant in the action may be a non-resident or not within reach of the process of the state court. But if service is made on the garnishee, the court has jurisdiction to dispose of that asset of the defendant and apply it to the payment of the plaintiff's debt." (Pp. 425-

426.) "The service of the summons on the bank is, under the doctrine thus established, the equivalent of a seizure of the property of each depositor in his account with the bank and gives the court jurisdiction over it to the same extent as in cases in garnishment and other proceedings *quasi in rem.*" (P. 427.)

Counsel for respondents argue that defendant Rosenbaum can have no property in a debt within this state unless it is conceded that the money is owed to him rather than someone else; that the obligation owed by the debtor is not property, for the chose in action consists of the right of the creditor to enforce the debtor's obligation; that unless that right be conceded there can be no property of the nonresident creditor, no res, within the jurisdiction. The argument proves too much. (12) The word "debt," when used in discussion of situs, necessarily includes the right of enforcement of the obligation, which can occur only at the domicile of the debtor or in such other place as service of process may be had upon him. But it does not follow that it must be a recognized right; a disputed claim properly may fall in the same category. The definition of personal property in subdivision 3 of section 17, Code of Civil Procedure, includes "things in action," as does section 14, subdivision 3, Civil Code, (See *Finley* v. *Winkler*, 99 Cal. App. 2d Supp. 887, 890 (222 P. 2d 345)). (13, 143) The right to recover a debt is commonly termed a chose in action, and that term is defined in Bouvier's Law Dictionary, Rawle's third revision, as "a right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action." (15) Where situs is concerned the obligation to pay and the right to collect are equivalent and they reside at the place of available process upon the debtor.

Inasmuch as our present task is to determine whether the doctrine of intangible res shall be recognized as apply-

ing to a controversy over ownership of a debt, considerations of practical justice may not be ignored. (6b) The only impediment to the exercise of jurisdiction in the instant case appears to be the unwillingness of defendant Rosenbaum who, though probably an indispensable party in a general sense, has no apparent interest in the litigation except his own fees. The convenience of all real parties in interest would be promoted by completion of the litigation in this jurisdiction where they reside and where most of the witnesses and documentary evidence seem to be available. We are persuaded that the debt owing by any respondent company constitutes a sufficient res in this jurisdiction to sustain an order or judgment based upon substituted service in a controversy over ownership of that debt, and that petitioners should prevail in these proceedings.

Let the writ of mandate issue in each case commanding respondent superior court to assume and exercise jurisdiction over petitioners' application for preliminary injunction and appointment of receiver as prayed herein.

Fox, Acting P. J., and Richards, J., pro tem,* concurred.

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*Assigned by Chairman of Judicial Council.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

No. 669,990

JOHN H. ANDERSON, JR., *et al., Plaintiffs,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, an unincorporated association and labor union, *et al., Defendants.*

No. 670348

WILLIAM (BILL) ATKINSON, *et al., Plaintiffs,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, an unincorporated association and labor union, *et al., Defendants.*

Memorandum for Counsel

A brief memorandum will be sufficient to indicate to counsel the basis of the court's determination in each case.

While there are a number of causes of action in each complaint, including claims of plaintiffs for damages as against the defendant Federation, the matters presently before the court with respect to the applications for preliminary injunctions and for appointment of a receiver fall within a narrow compass. The question first to be determined is that of jurisdiction and that problem is rooted in the contention of the plaintiffs that they, or persons whom they represent, are entitled to receive moneys payable by various defendants in the phonograph-record or television-film fields under certain agreements. The plaintiffs seek to enjoin those defendants from making payments of the moneys so claimed by the plaintiffs to the trustee of the Music Performance Trust Funds.

The trustee, Mr. Rosenbaum, although named as a party defendant in each case, cannot be personally served with process in this State, but is to be found in the State of New York. In view of that fact, does this court have jurisdiction to grant an injunction or appoint a receiver as sought by the plaintiffs? In seeking an answer to that question, some guidance is found in an article by Fletcher B. Andrews in 49 *Yale Law Journal* at page 241 (reprinted in part in *Selected Readings on Conflict of Laws* at page 306), the article being entitled "Situs of Intangibles in Suits Against Non-resident Claimants". Certain distinctions are to be noted. The cases at bar do not involve the interpleader problem (*New York Life Insurance Company* v. *Dunlevy*, 241 U.S. 518). Moreover, there is not presented a case in which a plaintiff seeks to have applied, in satisfaction of an obligation owed to him by a non-resident, property of the non-resident in the form of a debt owed the latter by a debtor upon whom the plaintiff is able to obtain personal service of process (*Harris* v. *Balk*, 198 U.S. 215). The problem is, rather, that of conflicting claims to a debt owed or an intangible obligation for the payment of money undertaken by a third person. While the authorities are not consistent and while there has been no direct determination of the question by the Supreme Court of the United States, the sound view under the facts here presented appears to be that there is no jurisdiction to resolve the conflicting claims unless jurisdiction *in personam* can be obtained over each claimant.

If the court had jurisdiction to do so, the exercise of a sound discretion would probably require the granting of a preliminary injunction and, perhaps, the appointment of a receiver, at least with respect to the 10 percent and 21 percent payments under schedule "A" of the labor agreement in the *Anderson* case, and with respect to the re-use payments in the *Atkinson* case. However, as set forth above, such jurisdiction does not exist.

Because the trustee, who is an indispensable party in the phase of each case under examination, is not subject to the process of the court, each application for a preliminary injunction and for a receiver will be denied *solely* upon the ground of lack of jurisdiction in the court. Counsel for the defendant Federation are requested to prepare a formal order in each case. The temporary restraining orders will not be dissolved until the court signs the formal orders to be submitted, or, with respect to the temporary restraining order in the *Atkinson* case, unless it shall expire prior thereto by its own terms.

Dated this 24th day of January, 1957.

JOHN J. FORD
Judge of the Superior Court